

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JOHN F. BEALBY</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 186,058 & 186,964
<b>PINSKER STEEL, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>TRANSPORTATION INSURANCE COMPANY AND</b>	)	
<b>CNA INSURANCE COMPANY</b>	)	
Insurance Carriers	)	
	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

The request for Appeals Board review of a July 24, 1995 Award by Special Administrative Law Judge William F. Morrissey was filed on behalf of the respondent and CNA Insurance Company and heard by the Appeals Board on December 5, 1995.

**APPEARANCES**

The claimant, having settled all issues between the claimant and the respondent in both docketed claims, appeared not. The respondent and its insurance carriers appeared by and through their attorney D. Steven Marsh of Wichita, Kansas. The Kansas Workers

Compensation Fund appeared by and through its attorney Steven L. Foulston of Wichita, Kansas.

### **RECORD AND STIPULATIONS**

The record considered by the Appeals Board is the same as that enumerated in the Award of the Special Administrative Law Judge.

The stipulations of the parties are listed in the Award of the Special Administrative Law Judge and are adopted by the Appeals Board for this review. In addition, the Kansas Workers Compensation Fund stipulates to the reasonableness of the settlement entered into between the claimant and the respondent.

### **ISSUES**

The Kansas Workers Compensation Fund has been dismissed from Docket No. 186,058. With the announced settlement of all issues as between claimant and respondent, the sole issue remaining for review and determination by the Appeals Board is the liability of the Workers Compensation Fund in Docket No. 186,964, if any.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Award of the Special Administrative Law Judge sets out his findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. Having reviewed the entire record, the Appeals Board finds that the findings and conclusions enumerated in the Award of the Special Administrative Law Judge are accurate and appropriate and hereby adopts same as its own findings as if specifically set forth herein. The Appeals Board further finds that the Award of the Special Administrative Law Judge should be affirmed in all respects.

The Special Administrative Law Judge found the Workers Compensation Fund not to be liable for any portion of the Award. Respondent seeks review of all findings by the Special Administrative Law Judge pertaining to Fund liability in Docket No. 186,964. Specifically, respondent argues that claimant sustained a work-related accident on February 10, 1994 which injury and resulting disability would not have occurred but for the claimant's preexisting condition. Respondent further contends that it retained claimant in its employment following his injury of December 27, 1993 thereby establishing that respondent knowingly retained a handicapped employee in its employment.

The Fund does not dispute that the claimant was a handicapped employee within the meaning of K.S.A. 44-566(b) upon his return to work with the respondent following his injury of December 27, 1993. Neither does the Fund dispute the fact that the respondent had knowledge of claimant's handicap which resulted from the December 27, 1993

accident which is the subject of the claim in Docket No. 186,058. Nevertheless, the Fund contends that it is without liability in Docket No. 186,964 because the claimant did not sustain a new accident on February 10, 1994. The Fund points to the opinion of Dr. Robert Eyster in support of its position that the incident of February 10, 1994 was not a new injury, but rather a temporary aggravation of his prior injury of December 27, 1993. While the Appeals Board does not agree with the Fund's position that it cannot be liable for a temporary aggravation of a preexisting condition, under the facts of this case the Appeals Board finds that the February 10, 1994 incident at work did not constitute a new accident and that the respondent has failed to meet its burden of proving Fund liability for the temporary aggravation of claimant's preexisting condition.

It should be noted that claimant suffered a low back injury which resulted in his undergoing disc surgery in 1986. However, when referring to the preexisting low back condition for purposes of the argument for Fund liability in Docket No. 186,964, respondent is only referring to the December 27, 1993 injury which is the subject of Docket No. 186,058. Respondent abandoned any allegation that it knowingly hired or retained a handicapped worker prior to December 27, 1993 by virtue of claimant's 1986 injury and surgery and dismissed the Fund from Docket No. 186,058. The Special Administrative Law Judge in his Award of July 24, 1995 found there to have been only one accident. All benefits in the Award under both Docket Nos. 186,058 and 186,964 were awarded by the Special Administrative Law Judge for an accidental injury which occurred on December 27, 1993. The record does not differentiate between temporary total disability compensation nor for medical benefits paid for the December 27, 1993 injury as opposed to the temporary aggravation of February 10, 1994. Thus, even were a second accident found to have occurred, respondent has failed to establish that any of the benefits paid claimant subsequent to February 10, 1994 were incurred as a result of the February 10, 1994 incident. Nevertheless, for the reasons expressed below, we agree with the Administrative Law Judge and find the February 10 incident to have resulted in only a temporary aggravation of claimant's preexisting condition. The Appeals Board further finds that all of the disability and medical benefits awarded by the Special Administrative Law Judge were the natural and probable consequence of the December 27, 1993 accident.

There were two medical experts deposed in this case. Robert Eyster, M.D., a board-certified orthopedic surgeon, was the claimant's treating physician. He first saw claimant on January 12, 1994. At that time claimant had complaints of lower back pain radiating into both legs and both feet. He related the symptoms to an accident which had occurred at work on December 27, 1993. Claimant had missed approximately two days of work following his injury but had returned to work and was still working at the time he was initially seen by Dr. Eyster. Claimant continued under the care of Dr. Eyster with some improvement until February 4, 1994 when claimant reported that his employer had him lifting more weight the day before and he felt that it increased his back pain. Claimant again saw Dr. Eyster on February 11, 1994 and reported more pain in his low back and into his left leg. Dr. Eyster took claimant off work and ordered an MRI which showed degenerative changes at several levels with a focal protrusion at L5-S1. Surgery was

performed on March 15, 1994 by Dr. Eyster for removal of recurrent disc fragment at L5-S1. Dr. Eyster described claimant's flareup of pain in February of 1994 as a temporary aggravation of a preexisting condition. He did not believe that there was any permanent damage from that incident. In this way, Dr. Eyster related claimant's recurrent disc herniation to the December 27, 1993 accident.

Claimant was sent by his attorney for an independent medical examination by Jane K. Drazek, M.D. Dr. Drazek is board certified in physical medicine and rehabilitation. Her examination was requested primarily for the purpose of providing an impairment rating, restrictions and an opinion on task loss for purposes of establishing work disability. She examined claimant on two (2) occasions, that being June 1, 1994 and again on October 7, 1994. She found an injury to have occurred on December 27, 1993 based upon the history of one accident given to her by claimant. Dr. Drazek indicated that the claimant described to her an injury on December 27, 1993, with an increase in his back pain on February 10, 1994. Although claimant's symptoms became more severe on February 10th, he did not describe an injury. Initially Dr. Drazek only apportioned the functional impairment rating she gave claimant between his 1986 injury and surgery and his December 27, 1993 injury and surgery. She did not give an opinion of there having been a subsequent injury until respondent's counsel read to her portions of claimant's regular hearing testimony and asked her to assume that history to be true. At the request of counsel at her deposition she did differentiate her rating as between the December 27, 1993 accident and the February 10, 1994 aggravation. However, we find her opinions in this regard not to be useful to the issue at hand. Dr. Drazek conceded that she did not see claimant prior to December 27, 1993 so it would be just conjecture on her part as to what his functional impairment would have been at that time. Similarly, Dr. Drazek did not see the claimant until after the February 10, 1994 aggravation and subsequent surgery. When pressed to give an apportionment as to the increase in claimant's impairment over that which existed before December of 1993, Dr. Drazek stated that her best estimate was that the majority of claimant's symptoms followed the December 27th injury and were present prior to the February injury. She indicated that it would be impossible to give percentages between the two (2) but then speculated that it could be "80-20." She characterized this opinion as just a guess. She also stated that she was not certain whether or not the February 1994 incident was only a temporary aggravation.

Although Dr. Eyster did increase the claimant's functional impairment rating for events following the December 27, 1993 accident, it appears that he attributes the increase to claimant's second surgery and not to the temporary aggravation on February 10, 1994. Because Dr. Eyster had the unique opportunity to examine the claimant both before and after the February 10, 1994 incident and, given the more certain nature of his testimony on the issue, the Appeals Board finds the opinion of Dr. Eyster to be the more persuasive. Accordingly, the Appeals Board concurs with the finding by the Special Administrative Law Judge that no new accident occurred on February 10, 1994; said incident constituted at most a temporary aggravation of the claimant's preexisting condition without permanent aggravation or additional impairment.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated July 24, 1995 should be, and hereby is, affirmed in all respects, and the orders contained in the Award are hereby adopted by the Appeals Board.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dale V. Slape, Wichita, KS  
D. Steven Marsh, Wichita, KS  
Steven L. Foulston, Wichita, KS  
William F. Morrissey, Special Administrative Law Judge  
Philip S. Harness, Director